No. 948 77

Brf. of Guthrie, Fentress & Mayes

for Appt. (a

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JAMES H. McKENNEY
Clerk

Supreme Court of the United States.

OCTOBER TERM, 1899.

Filed Nov. 6, 1899.

NO. 948.

ON MOTION TO DISMISS OR AFFIRM.

ILLINOIS CENTRAL RAILROAD COMPANY,
Appellant,

vs.

WIRT ADAMS, State Revenue Agent, *et als.*

Appeal from the Circuit Court of the United States for the Southern District of Mississippi.

BRIEF FOR APPELLANT IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM.

WILLIAM D. GUTHRIE,
JAMES FENTRESS,
EDWARD MAYES,
Of counsel for appellant.

WASHINGTON, November 6, 1899.

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 318.

ILLINOIS CENTRAL RAILROAD COMPANY, *Appellant*,

vs.

WIRT ADAMS, State Revenue Agent, *et als.*

Appeal from the Circuit Court of the United States for the Southern District of Mississippi.

BRIEF FOR APPELLANT IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM.

The court is now asked to summarily dismiss an appeal involving serious questions as to the jurisdiction of the Circuit Court of the United States as duly certified by that court.[1] The questions are difficult, and they ought not to be disposed of without a hearing in court. Under no aspect could it be seriously argued that, within the language of the rule, "it is manifest the writ or appeal was taken for delay only, or that the question on which the jurisdiction

[1] I, Henry C. Niles, judge, presiding over said court at the May term, 1899, do hereby certify that in the course of the proceedings in said cause before me the following questions arose pertinent to the jurisdiction of said court in said cause, and were in issue between the parties litigant and were discussed by counsel and considered by the court.

[RECITAL OF BILL.]

On the 1st day of May, 1899, being the first day of the May term, 1899, of the said circuit court, the said cause was finally dismissed by order of the court on the motion of said defendants, Wirt Adams, State revenue agent, and the said Railroad Commission and their said clerk; to which dismissal the complainant excepted.

Now, therefore, it is certified that the question of the jurisdiction of this court was in issue in said cause upon the grounds hereinbefore stated, namely:

depends is so frivolous as not to need further argument." Indeed, it may be said that the Circuit Court of Appeals of the Fifth Circuit, before which the question came on an appeal from an order discharging a restraining order, clearly intimated its own view that the court below had jurisdiction, and dismissed the appeal merely because it had no jurisdiction. *Illinois Cent. R. Co.* v. *Adams*, 93 Fed. Rep. 852, 856.

By this motion, however, the appellee seeks to precipitate a discussion involving much more than the jurisdiction of this court, and asks the court to decide, without oral argument, (1) as to the jurisdiction of this court, (2) as to the jurisdiction of the Circuit Court, (3) as to the possible jurisdiction of the Circuit Court of Appeals, (4) a question of *res adjudicata* never before determined here, and (5) the entire merits not only of this suit, but also of two other appeals (Nos. 319 and 320) and two writs of error (Nos. 244 and 324) on this docket, and of several suits yet pending undetermined in the state

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1. That the complainant in its original bill showed no jurisdiction on the ground of diversity of citizenship. Defendants claim that its interest was derivative through the Canton, Aberdeen and Nashville, and that the complainant had no right to raise jurisdiction in the Federal courts by making the Canton, Aberdeen and Nashville Railroad Company a party defendant in the cause.

2. That the complainant by its original bill showed no jurisdiction in this court because of the subject-matter stated, inasmuch as the bill set forth no particular Federal question.

3. That there was no jurisdiction in this matter, because the bill was a suit against the State of Mississippi and in violation of the eleventh amendment to the Constitution of the United States.

The court having dismissed the bill on the grounds of want of jurisdiction, the foregoing three questions arising upon the pleadings, the process, and the evidence are hereby certified to the Supreme Court of the United States for its decision, in conformity with the fifth section of the act of Congress of the year 1891.

Certified to by me this the 16th day of May, 1899, being a day of the current term, 1899, of the said Circuit Court of the United States.

H. C. NILES,
Judge.

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courts of Mississippi. We venture to say that such a departure from fixed and orderly procedure is without parallel or excuse.

The appellant is asked to meet four grounds of motion, in support of which over one hundred and sixty authorities are cited, many of which are not in point, but a careful examination of all of which was requisite, and involved very much more labor than was at all necessary. Indeed, counsel for the appellee states that if the court "desires more light on any one point, they will find that our briefs in each of the cases Nos. 318, 319 and 320 are to some extent different, and made to reinforce each other." As matter of fact, although counsel for the appellant have received two briefs in No. 320, they have not yet received any briefs in No. 319. Of course, this practice ought not to be sanctioned on a motion of this character.

The points will be discussed in the order in which they are presented in the brief, but a short summary of the bill of complaint will enable the court to appreciate the real ground of jurisdiction in the Circuit Court; *i. e.*, of "suits of a civil nature, * * * in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and *arising under the Constitution or laws of the United States.*"[1] Jurisdiction was also claimed by reason of diversity of citizenship.

STATEMENT OF THE BILL.

The bill was filed by the appellant, a corporation of the State of Illinois, against the State Revenue Agent and the Railroad Commission of Mississippi, all citizens

[1]Act of August 13, 1888, c. 866, sec. 1, 25 Stat. 434.

of that state, and the Canton, Aberdeen and Nashville Railroad Company, a corporation of the same state. It set forth, among other things, the constitution of Mississippi of 1869, declaring that "the property of all corporations for pecuniary profits shall be subject to taxation, the same as that of individuals," and that "taxation shall be equal and uniform throughout the State. All property shall be taxed in proportion to its value, to be ascertained as directed by law"[1] (record, p. 2). It was averred that there was no constitutional or statutory provision reserving the right to repeal or amend charters granted by the legislature, nor had there been any such provision since the constitution of 1869, and that many exemptions from taxation had been granted to corporations which were in force at the time of the adoption of that constitution (*id.*, p. 3). The bill then specifically referred to the provision found in section 21 of the charter of the Mobile and Northwestern Railroad Company, approved July 20, 1870, appropriating and setting apart the taxes to which that company should be subject for thirty years to the payment of its construction debt and liabilities,[2] and showed that, at the same session, "all the rights, privileges, immunities and franchises granted by the act of incorporation of the said Mobile and Northwestern, embraced in the twenty-first section thereof," were conferred upon nine other railroad companies theretofore chartered. It was also alleged that the legislature, at its sessions between 1870 and 1878, passed many laws granting exemptions to corporations "for pecuniary profits," and particular mention was made of the act of April 1, 1872, entitled "An Act to encourage the introduction of

[1] Constitution Mississippi, 1869, Art. XII., sec. 20.
[2] Laws Mississippi, 1870, c. 104, sec. 21, p. 268.

Machinery and the establishment of Factories in the State of Mississippi,"[1] by which the state agreed with all manufacturing corporations having a capital stock of not less than ten thousand dollars that all taxes to which such companies should be subject for ten years were appropriated and set apart to the payment of debts incurred for construction and machinery (record, p. 4). The bill then set forth the decision and judgment of the Supreme Court of Mississippi in the so-called "Mississippi Mills case" (*Mississippi Mills* v. *Cook*, 56 Miss. 40) rendered in 1878, wherein that court construed the provisions of the constitution of 1869 already mentioned, and declared and settled the rule to be that those provisions did not require the legislature to tax the property of corporations for pecuniary profits, and that the words "subject to" in the constitution did not mean "subjected to," but rather that said "provision is mandatory, not that the property of the corporation shall be taxed (that is left to the legislature), but such property shall ever be subject to, *i. e.*, liable to be taxed, if the legislature so wills; * * The provision is mandatory as to universal liability to be taxed, but permissive to the legislature to tax the property of such corporations, or exempt it, as it may see proper." It was further stated that this adjudication had been followed and reaffirmed by the court in many cases since its rendition, and

> "has for twenty years been the settled law and rule of property of the said State, and has been adopted and acted upon by the legislative, the executive and the judicial departments of said State, and by the agents and officers of the said State, and the counties and municipalities therein, and under said settled law and rule of property, ***and upon the faith thereof***, enormous sums of money have been invested in said State, which otherwise would not have been so invested, and particularly the invest-

[1] Laws Mississippi, 1872, c. 73, p. 65.

> ments made by your orator, as hereinafter mentioned, and that many contracts, such as charter contracts with the State and other contracts between individuals or corporations, have been executed and acted upon, and the status of the parties changed so that they cannot now be restored; *all upon the faith of said settled law and rule of property*, among which are certain contracts hereinafter mentioned" (record, pp. 5, 6).

After alleging a continued course of legislative exemption of many corporations from taxation, the bill proceeds to show that the state railroad commission had never before denied the validity of the exemption of the Canton, Aberdeen and Nashville Company, nor attempted to assess that company for taxation; that the constitution of Mississippi, adopted in 1890, expressly provided that "exemptions from taxation to which corporations are legally entitled at the adoption of this constitution shall remain in full force and effect for the time of such exemptions *as expressed in their respective charters*, or by the general laws, unless sooner repealed by the legislature" (Constitution 1890, sec. 181); and that successive legislatures had, since the adoption of that constitution, refused to repeal exemptions contained in charters theretofore granted (record, pp. 6, 7). It is alleged that the complainant, "relying in good faith on the constitution and law as settled in the Mississippi Mills case aforesaid, and the practical construction of said constitution of 1869, as aforesaid, by all the departments and officers of the said State," agreed to advance large sums of money toward building railroads in the state, if a charter exempting them from taxation for not less than twenty years were granted. The act incorporating the defendant Canton, Aberdeen and Nashville Railroad Company was accordingly passed, and became a law on February 17, 1882. Section 8 of that act was as follows:

> "That in order to encourage the investment of capital in the

works which said company is hereby authorized to construct and maintain and to make certain in advance of such investment and as an inducement and consideration therefor, the taxes and burdens which this State will and will not impose thereon, it is hereby declared that said company, its stock, its railroads and appurtenances and all its property in this State necessary or incident to the full exercise of all the powers herein granted, not to include compresses and oil mills, shall be exempt from taxation for a term of twenty years from the date of the approval of this act, and when the period of exemption herein prescribed shall have expired, the property of said railroad may be taxed at the same rate as other property in this State; all of said taxes to which the property of said company may be subject in this State, whether for county or State, shall be collected by the Treasurer of this State and paid into the State Treasury to be dealt with as the Legislature may direct, but said company shall be exempt from taxation by cities and towns."[1]

This charter also empowered the company to consolidate with other railroad companies, and to lease its railroads and other property, including immunities, for a term of years or in perpetuity (record, p. 8).

It is then alleged that, upon the faith of the foregoing interpretation of the constitution of Mississippi, the complainant "advanced the money to build and equip said Canton, Aberdeen and Nashville railroad, * * to wit, the sum of $2,536,924.13, and that the same was built with the money so furnished" and that a lease of the railroad so built, running to June 1, 1952, was, on March 31, 1888, executed to the complainant as authorized by the laws of the state; and that the complainant has since been and now is in possession of the property thereunder. The lease covered the railroad, franchises, immunities, etc., including the exemption from taxation. It is alleged that any assessment of the taxes will result in loss to the complainant, and that the levying of the taxes will

[1]Laws Mississippi, 1882, c. 554, sec. 8, p. 1009.

create a paramount lien upon the property superior to the complainant's rights and "violating * * the obligations of said charter contract, and said lease" (record, pp. 8, 9).

The bill expressly alleges that the charter (including the exemption), the right to lease, and the lease itself were contracts rightfully made "in view of the settled law as declared," and valid under the constitution and laws of Mississippi as previously expounded, and that the obligation of these contracts is binding as against any subsequent change of judicial decision (*id.*, p. 9). The bill also asserted the discretion of each legislature, under the state constitution, to determine what property should be subjected to taxation, and denied the constitutional power of any subsequent legislature to compel the payment of taxes retroactively, while not denying the power of the legislature to repeal the exemption in the charter as to future taxes (*id.*, pp. 9, 10). Many other charters containing similar exemptions are alleged to have been passed by the legislatures of 1882, of 1884 and of 1888, and a uniform public policy of inviting the investment of capital in railroad building by offering an exemption from taxation was deduced (*id.*, pp. 13, 14). It is shown that the railroad in question had cost up to June 30, 1897, $2,536,924.13, and the result of its operation between the years 1889 and 1897 showed an average yearly deficit of $129,892.89 (*id.*, pp. 14, 15, 16). No interest has been paid upon the mortgage bonds since January 1, 1889, and no dividends have ever been paid (*id.*, p. 16).

The bill then proceeded to show the execution of a mortgage on December 1, 1884, by the Canton, Aberdeen and Nashville Railroad Company upon its railroad and franchises, including the exemption, to secure $2,000,000 of bonds which were sold to the complainant, and a subse-

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quent mortgage securing $1,750,000 which were exchanged for a like amount of the former bonds, a note for the balance of $250,000 being secured by a subordinate mortgage. The latter bonds and the note were paid for in par, in good faith, and "as secured by a paramount lien, and in reliance upon the said sections of said charter as valid, and upon said mortgaged premises as being free from taxation for twenty years" (*id.*, pp. 17, 18).

Reference is then made to the long series of decisions of the Supreme Court of Mississippi in which the *Mississippi Mills* case had been followed;[1] and these decisions are alleged to have been overturned and overruled by the decision in *Adams* v. *Yazoo and Mississippi Valley Railroad Co.*, rendered June 20, 1898, where the court declared that the constitution of 1869, in respect of corporate taxation, meant the exact opposite to what it had been determined to mean in the *Mississippi Mills* case and the decisions which had followed that authority (*id.*, p. 19). It is alleged that the state revenue agent and the railroad commission have taken steps to levy taxes against the complainant and the Canton, Aberdeen and Nashville Railroad Company for all the years since 1886; that these taxes will be certified to the various collectors who will seize the property of the complainant and parts of the railroad; that the taxes are claimed to be a lien paramount to the mortgages and the lease, and that the alleged lien of the taxes is a cloud upon the title of the complainant as lessee and as creditor (*id.*, pp. 20, 21).

The bill specifically alleges that the acts of the defendants in creating and attempting to enforce the alleged lien

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[1] *Mississippi Mills* v. *Cook*, 56 Miss. 40, 50; *McCulloch et al.* v. *Stone*, 64 Miss. 378, 394; *Y. & M. V. R. R. Co.* v. *Thomas et al.*, 65 Miss. 553, 562; *Vicksburg Bank* v. *Worrell*, 67 Miss. 47, 58; *L. N. O. & T. Ry. Co.* v. *Taylor*, 68 Miss. 361; *Railroad Co.* v. *Lambert*, 70 Miss. 779, 787.

for taxes are in violation of the obligation of the charter, of section 10 of Article I. of the Federal Constitution and of the Fourteenth Amendment (*id.*, p. 21); that the subsequent general revenue laws under which the revenue agent is acting are a violation of section 10 of Article I.; and that the lien resulting from the assessment of the taxes will deprive the complainant, and also the Canton, Aberdeen and Nashville Railroad Company, its stockholders and creditors, of property without due process of law (*id.*, p. 22). The complainant shows that it advanced the money to build the railroad, took the lease thereof, for which the exemption was a material consideration, and received the bonds, in view of the provisions of the constitution of 1869 and the interpretation thereof in the *Mississippi Mills* case in 1878, and avers that its rights cannot be impaired by subsequent change in such interpretation, stating that the *Mississippi Mills* case and other cases following it have created a rule of property which cannot be overturned so as to impair the complainant's rights under contracts which were valid when made (*id.*, p. 23).

It is further alleged that many suits have been begun by counties and towns for their shares of the back taxes claimed against other companies; that a like multiplicity of suits will be instituted against the complainant for such taxes, and that the county and town collectors have statutory authority to make seizures of property in order to effect summary collection. Payment under protest would only result in a multiplicity of suits to recover back the payments made. Any remedy at law would be of doubtful utility as to the counties and towns and ineffectual as against the state (*id.*, p. 23, 24).

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The prayer of the bill was, in substance, for a decree enjoining the approval and certification of the assessment of taxes, the beginning of suits for the recovery of such taxes, the taking of "any proceedings looking to the subjection of the property of your orator, or of the railroad known as the Canton, Aberdeen and Nashville railroad, to the payment of the taxes so claimed, as aforesaid, for the years 1886 to 1897, both inclusive," * * and declaring the property of the complainant and the Canton, Aberdeen and Nashville Railroad to be exempt from state and county taxation for such years, and that the charter contract of exemption be declared valid and binding as to state and counties for the term of twenty years, unless sooner repealed; that such assessment be decreed to to be null and void, and the cloud thereof removed; and for further relief (*id.*, pp. 26, 27).

So far as general equitable jurisdiction is concerned, the bill is thus seen to be founded upon two independent, but consistent, grounds; viz., the jurisdiction to avoid a multiplicity of suits at law and the jurisdiction to remove clouds from titles.[1] If, therefore, the allegations of the bill,

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[1] *Osborn* v. *U. S. Bank*, 9 Wheat. 738, 840; *Cummings* v. *National Bank*, 101 U. S. 153, 157; *Union Pacific Railway Co.* v. *Cheyenne*, 113 U. S. 516, 525; *Allen* v. *Baltimore & Ohio R. R. Co.*, 114 U. S. 311, 316; *Scott* v. *Donald*, 165 U. S. 107, 112; *Ogden City* v. *Armstrong*, 168 U. S. 224, 236; *Smyth* v. *Ames*, 169 U. S. 466, 516; *Norwood* v. *Baker*, 172 U. S. 269, 276; *Owensboro National Bank* v. *Owensboro*, 173 U. S. 664; *National Bank of Louisville* v. *Stone*, 174 U. S. 432.

The remedy of injunction has been frequently granted in Mississippi to restrain the collection of taxes from which the complainant was exempt. *Mobile & Ohio R. R. Co.* v. *Moseley*, 52 Miss. 127, 137; *Vicksburg Bank* v. *Worrell*, 66 Miss. 47, 50; *L. N. O. & T. Ry. Co.* v. *Taylor*, 68 Miss. 361, 365; *Railroad Co.* v. *Lambert*, 70 Miss. 779. The Annotated Code of 1892 provides (§ 483): "The chancery court shall have jurisdiction of suits by one or more taxpayers in any county, city, town or village, to restrain the collection of any taxes levied or attempted to be collected without authority of law." *Greeley* v. *Lowe*, 155 U. S. 58, 75; *Bardon* v. *Land & River Improvement Co.*, 157 U. S., 327, 330; *Rich* v. *Braxton*, 158 U. S. 375, 405; *Smyth* v. *Ames*, 169 U. S. 466, 516.

none of which appears to be in any way in issue upon the record here, made a case within the jurisdiction of the Circuit Court as a federal court, that court was in error in dismissing the bill and the decree should be reversed. The proceedings in the Circuit Court of Appeals appear to be immaterial here, inasmuch as that court only passed upon questions affecting its own jurisdiction.

I.

The effect of the subsequent decree in the Mississippi State Court.

The first ground of the motion to dismiss is that this court will not sustain an appeal which is shown to be entirely unnecessary.

The suit was brought to restrain Wirt Adams, as State Revenue Agent, from enforcing certain tax laws of the State of Mississippi, which, as construed by the state court and given force by its later decisions, impaired the obligation of the contract relied on by the appellant. The State Revenue Agent was specially charged with the collection of such taxes and given a large pecuniary interest therein. Within the authorities cited under point IV., the suit was not within the inhibition of the Eleventh Amendment.

The court below held that it had no jurisdiction upon three grounds—that there was no diversity of citizenship, that there was no federal question, and that the suit was against a state; and dismissed the bill accordingly, but certified the question of jurisdiction to this court. After the commencement of the suit, but before the final decree dismissing the bill, and while an application for a rehearing was pending undetermined in the Circuit Court of Appeals, the State Revenue Agent commenced suit in a state court to collect the taxes, and such proceedings were

had that a decree for the taxes in question was entered in the Chancery Court for Clay County against both the Canton, Aberdeen and Nashville Railroad Company, and the Illinois Central Railroad Company, the appellant here. The defendants appealed, as authorized by the state practice, to the Supreme Court of the State of Mississippi, and on such appeal, as the affidavit of Mr. Edward Mayes on file shows, gave a full supersedeas bond. The question for this court is whether this judgment, although duly appealed from and covered by a supersedeas bond, ousts the federal court of jurisdiction, notwithstanding that the judgment in the state court may be reversed and declared a nullity, in which event the appellant in this case would have to begin a new suit in the United States Circuit Court to obtain the same relief. This point of the effect of the judgment so appealed from and covered by a supersedeas bond is undoubtedly a difficult and close one. It is, however, a question which has never been decided by this court. On the contrary, in a case at the last term where the point was presented, the court found that it was not necessary to consider the authorities which hold that a perfected appeal substantially vacates or suspends the judgment below. *Hubbell* v. *United States*, 171 U. S., 203, 210.

Numerous cases are cited by the appellee to sustain the proposition that a judgment, although an appeal has been taken accompanied by a *supersedeas*, is yet available in support of a plea of *res adjudicata*. Many of the cases thus cited utterly fail to sustain the proposition; and authorities of great respectability may be referred to where the precise point has been ruled the other way. *Woodbury* v. *Bowman*, 13 Cal. 634; *People* v. *Treadwell*, 66 Cal. 400, and cases

cited; *Spears* v. *County of Modoc*, 101 Cal. 303, 304; *Glenn* v. *Bursh*, 3 Colo. 26, 36; *Card* v. *Foot*, 57 Conn. 427, 431; *Sharon* v. *Hill*, 26 Fed. Rep. 337, 345; *Byrne* v. *Prather*, 14 La. Ann. 653; *Day* v. *De Jonge*, 66 Mich. 550; *Ketchum* v. *Thatcher*, 12 Mo. App. 185; *Haynes* v. *Ordway*, 52 N. H. 284; *Hall* v. *Calvert*, 46 S. W. Reporter, 1120, 1125; *Railroad* v. *Brigam*, 95 Tenn. 624.

The effect of an appeal in admiralty has always been to suspend the sentence altogether, so that it could not be used as *res adjudicata* until the determination of the appeal. *Yeaton* v. *The United States*, 5 Cranch, 281, 283; *Souter* v. *Baymore*, 7 Pa. St. 415, 417. See also, *Draper* v. *Davis*, 102 U. S. 370; *Keyser* v. *Farr*, 105 U. S. 265.

Even where it has been held that a judgment from which an appeal had been taken was still available to support a plea of *res adjudicata*, it has nevertheless been conceded that such a plea could not be availed of so as to work an injustice, and therefore that in proper cases execution upon a judgment obtained upon such a plea would be stayed to await the event of the appeal. Durfee, C. J., said in *Paine* v. *Schenectady Insurance Co.*, 11 R. I. 411, 416:

> "We will add, however, as a matter of practice, that we think the pendency of the appeal in New York may be a good ground for delaying judgment here until the appeal is disposed of; for otherwise we may give the judgment here a permanently conclusive effect, whereas in New York, if the appeal is successful, it will be conclusive only for a short time."

See, also, *Scott* v. *Pilkington*, 2 Best & Smith, 11, 41; 1 Tidd's Prac. (3d. Am. Ed.) 530 *et seq.*; *Newcomb* v. *Drummond*, 4 Leigh, 58.

If the motion to dismiss should be granted on the ground now discussed, the court will have given the decree of the Chancery Court of Clay County, Mississippi,

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a "permanently conclusive effect," and will have ousted its own jurisdiction and that of the Circuit Court of the United States to hear and determine the cause.

We are not concerned here with the doctrine of *res adjudicata* as a matter of strict right. The motion in this respect is addressed to the discretion of the court. That discretion should not be so exercised as to impair the jurisdiction unless it is perfectly clear that in no possible event can the appellant prevail upon a hearing on the merits of the court below. *Non constat* but that, by the time we are heard upon the merits in the Circuit Court, the Supreme Court of Mississippi may have reversed the judgment in the principal case, thus setting the alleged estoppel at large, and opening the way to appellant's ultimate success. These questions are important. They have never yet been directly settled in this court, and should be postponed to the hearing on the merits. The validity of appellant's claim to an exemption can then be settled for the future as well as for the past, and the litigation finally determined. *United States* v. *Freight Association*, 166 U. S. 290, 307.

In *Reilly* v. *Bader*, 50 Minn. 199, 203, the court refused to consider the point of *res adjudicata* upon a motion, saying: "Without questioning the correctness of counsel's position in respect to the conclusiveness, generally, of the first final judgment between the same parties and their privies, touching the same subject-matter, it is perfectly obvious that the object sought for by him cannot be attained by means of a motion. Such practice is unheard of." Moreover, the defendants are proceeding with their suits in the state courts and cannot possibly be prejudiced in any aspect by the delay necessary to secure for this question of jurisdiction the attention its impor-

tance merits. See *Marsh* v. *Shepard*, 120 U. S. 595, 597, where the motion was based upon a very similar ground.

II.

Jurisdiction of this Court.

The appeal to this court was prayed under the first clause of section 5 of the act of March 3, 1891 (record, p. 44). The only error assigned was that "the court erred in dismissing the bill * * for want of jurisdiction to entertain the same" (*ib.*). The allowance of the appeal stated: "This appeal is granted solely upon the question of jurisdiction, this court having refused to assume jurisdiction in this cause" (*id.*, p. 45). In accordance with the practice followed in *Shields* v. *Coleman*, 157 U. S. 168, the Circuit Court reserved to itself the determination of the question as to the portions of the record to be sent up in case counsel should not agree (record, p. 465). The certificate, which was based upon that approved in *Colvin* v. *Jacksonville*, 158 U. S. 456, 458, stated the three questions of jurisdiction involved, recited that the bill was dismissed for want of jurisdiction, and formally certified the three questions already stated (record, pp. 47–49). Even without the certificate, the question of jurisdiction sufficiently appeared. *In re Lehigh Min. & M'f'g Co.*, 156 U. S. 322, 327; *Shields* v. *Coleman*, 157 U. S. 168, 176; *Interior Construction Co.* v. *Gibney*, 160 U. S. 217, 219; *Smith* v. *McKay*, 161 U. S. 355, 357.

If the Circuit Court was right in holding that there was no diversity of citizenship sufficient to sustain the jurisdiction, that only left the case as if no such diversity had ever been claimed. There was another independent and substantial ground of jurisdiction arising from the subject matter of the suit, namely that the case arose under the Constitution of the United States, and the

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two remaining questions which have been certified are sufficient to sustain the jurisdiction of this court to entertain the appeal. Both questions go to the jurisdiction of the Circuit Court "as a court of the United States" (*Blythe* v. *Hinckley*, 173 U. S. 501, 507). The second ground certified—that "the bill set forth no particular federal question"—could relate to nothing but the jurisdiction conferred by section one of the act of August 13, 1888. The third ground certified—that the "bill was a suit against the State of Mississippi and in violation of the Eleventh Amendment"—related as clearly to the jurisdiction of the court as a federal court. The language of the Eleventh Amendment is expressly directed to the "judicial power," *i. e.*, jurisdiction, power to hear and determine, of the courts of the United States.

> "The *Judicial power of the United States* shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

The Amendment does not effect a limitation upon the jurisdiction of courts in general, but operates only upon the "judicial power" of the United States which can be exercised through the medium and jurisdiction of the Federal courts alone; and it deals with the question of power *vel non*, and not with the method of the exercise of that power. The question of jurisdiction in this respect is pre-eminently one of federal cognizance. This court very lately said, where the same point was involved: "The principal question before us is whether this suit is one of which a Circuit Court of the United States may take cognizance *consistently with the Constitution of the United States.*" *Fitts* v. *McGhee*, 172 U. S. 516, 524.

The 94th rule in equity has nothing to do with the

case presented here. The complainant does not sue as a stockholder, nor is the bill founded on rights of the Canton, Aberdeen and Nashville Railroad Company. The suit is brought to enforce and protect the complainant's vested rights, as lessee of the property, to the exemption granted by the contract (record, pp. 8, 9). The power to make a lease which should include the exemption was expressly granted by the charter containing that immunity (*id.* p. 8). The alleged lien of the taxes sought to be imposed will, if enforced, be paramount to the lease to the complainant (*id.* pp. 20, 21).

The questions of the jurisdiction of the court below, as a federal court, appear so clearly and conclusively upon the record, that it is not deemed necessary to follow the appellee further in his argument upon this point, the entire relevancy of which is not perceived.

III.

Jurisdiction and power of the Circuit Court.

The bill of complaint presented a case clearly within the jurisdiction of the Circuit Court. The contract embodied in the charter of the Canton, Aberdeen and Nashville Railroad Company and the subsequent contract of lease between that company and the complainant were set forth, and it was specifically charged that the subsequent legislation of the state had impaired those contracts and the rights resulting therefrom (record, p. 22). This was all that was necessary to sustain the jurisdiction as of a case arising under the Constitution of the United States.

In the recent case of *City Railway Co.* v. *Citizens' Railroad Co.*, 166 U. S. 557, Mr. Justice Brown had occasion to lay down the rule as follows (p. 562):

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"There can be no doubt that the Circuit Court had jurisdiction of the case, notwithstanding the fact that both parties are corporations and citizens of the State of Indiana. It should be borne in mind in this connection that *jurisdiction depended upon the allegations of the bill*, and not upon the facts as they subsequently turned out to be. The gravamen of the bill is that, under the act of the general assembly of 1861, and the ordinances of January 18, 1864, and April 7, 1880, the Citizens' Railroad Company had become vested with certain exclusive rights to operate a street railway in the city of Indianapolis, either in perpetuity or for the term of thirty years or thirty-seven years, which the city had attempted to impair by entering into a contract with the City Railway Company to lay and operate a railway upon the same streets.

"ALL THAT IS NECESSARY TO ESTABLISH THE JURISDICTION OF THE COURT IS TO SHOW THAT THE COMPLAINANT HAD, OR CLAIMED IN GOOD FAITH TO HAVE, A CONTRACT WITH THE CITY, WHICH THE LATTER HAD ATTEMPTED TO IMPAIR. * *

"Whether the State had or had not impaired the obligation of this contract was not a question which could be properly passed upon, on a motion to dismiss, so long as the complainant claimed in its bill that it had that effect, and such claim was apparently made in good faith, and was not a frivolous one. *New Orleans* v. *New Orleans Water Co.*, 142 U. S. 79, 88."

The jurisdiction of the federal courts has been invoked in many similar cases: *New Orleans Gas Co.* v. *Louisiana Light Co.*, 115 U. S. 650; *New Orleans Water-Works Co.* v. *Rivers*, 115 U. S. 674; *Tammany Water Works* v. *N. O. Water Works*, 120 U. S. 64; *Hamilton Gas Light Co.* v. *Hamilton City*, 146 U. S. 258; *Walla Walla* v. *Walla Walla Water Co.*, 172 U. S. 1.

In *Smyth* v. *Ames*, 169 U. S. 466, 518, Mr. Justice Harlan said:

"These are cases of which, so far as the plaintiffs are concerned, the Circuit Court has jurisdiction * * upon the further ground that, as the statute of Nebraska under which the State Board of Transportation proceeds is assailed as being repugnant to rights secured to the plaintiffs by the Constitution of the United States, *the cases may be regarded as arising under that instrument.*"

The case being thus within the jurisdiction of the

federal courts by reason of its subject matter, those courts will apply the same rules of decision as if jurisdiction were based upon diverse citizenship. Nothing is better settled than that the federal circuit courts, in the exercise of their original jurisdiction, and this court, upon appeal from their decisions, are not bound by state decisions in cases where rights have been acquired in reliance upon the law as expounded at the time by the state tribunals. No subsequent change of judicial opinion has been permitted to impair those rights. This has never been the subject of doubt in this court since the decision in *Gelpcke* v. *City of Dubuque*, 1 Wall. 175, 206, where Mr. Justice Swayne said:

> " 'The sound and true rule is, that if the contract, when made, was valid by the laws of the State as then expounded by all departments of the government, and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent action of legislation, *or decision of its courts altering the construction of the law.* The Ohio Life & Trust Co. v. Debolt, 16 Howard, 432.'
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> "The same principle applies where there is a change of judicial decision as to the constitutional power of the legislature to enact the law. To this rule, thus enlarged, we adhere. It is the law of this court. It rests upon the plainest principles of justice. To hold otherwise would be as unjust as to hold that rights acquired under a statute may be lost by its repeal."[1]

Jurisdiction is not, of course, claimed because of the judicial impairment of the complainant's contract rights. No such idea is entertained. But jurisdiction is claimed

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[1] The following cases illustrate the doctrine: *Meyer* v. *The City of Muscatine*, 1 Wall. 384, 393; *Havemeyer* v. *Iowa County* 3 Wall. 294, 303; *Mitchell* v. *Burlington*, 4 Wall. 270, 274; *Lee County* v. *Rogers*, 7 Wall. 181, 183; *The City* v. *Lamson*, 9 Wall. 477, 485; *Chicago* v. *Sheldon*, 9 Wall. 50, 55; *Olcott* v. *The Supervisors*, 16 Wall. 678, 690; *Supervisors* v. *United States*, 18 Wall. 71, 82; *Boyce* v. *Tabb*, 18 Wall. 546, 548; *Township of Pine Grove* v. *Talcott*, 19 Wall. 666, 678; *Township of Elmwood* v. *Marcy*, 92 U. S. 289, 294; *Ober* v. *Gallagher*, 93 U. S. 199, 207; *Commissioners*, etc., v. *Thayer*, 94 U. S. 631, 642; *Douglass* v. *County of Pike*, 101 U. S. 677, 686, 687; *Thompson* v. *Perrine*, 103

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because a legislative impairment of those rights makes a case arising under the Constitution of the United States and within the original jurisdiction of the Circuit Courts of the United States. In administering that jurisdiction the federal courts will protect the complainant against any impairment of the rights which it has acquired in reliance upon the laws of the state as declared, although in so doing they may run counter to a subsequent change in judicial opinion.

"In that case [*Gelpcke* v. *City of Dubuque*] it was held, that if the contract, when made, was valid by the constitution and laws of the State, as then expounded by the highest authorities whose duty it was to administer them, no subsequent action by the legislature *or judiciary* can impair its obligation. This rule was established upon the most careful consideration. We think it rests upon a solid foundation, and we feel no disposition to depart from it." Mr. Justice Swayne in *Havemeyer* v. *Iowa County*, 3 Wall. 294, 303.

"After the decision of this court in the case of *Gelpcke* v. *The City of Dubuque*, 1 Wall., 176, 223, and the series of cases following it, we must decline a re-examination of the question. We regret the difference of opinion on the subject of these bonds, between this court and the courts of the State of Iowa; but it involves a principle and rule of property, in our opinion, so just, and so essential to the protection of the rights of the *bona fide* holder of this

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U. S. 806, 816; *Taylor* v. *Ypsilanti*, 105 U. S. 60, 72; *County of Ralls* v. *Douglass*, 105 U. S. 728, 731; *Louisiana* v. *Pilsbury*, 105 U. S. 278, 294; *Burgess* v. *Seligman*, 107 U. S. 20, 33; *Green County* v. *Conness*, 109 U. S. 104, 105; *Carroll County* v. *Smith*, 111 U. S. 556, 562; *Anderson* v. *Santa Anna*, 116 U. S. 356, 361; *Bolles* v. *Brimfield*, 120 U. S. 759, 763; *German Bank* v. *Franklin Co.*, 128 U. S. 526, 538; *Clark* v. *Bever*, 139 U. S. 96, 117; *Knox County* v. *Ninth National Bank*, 147 U. S. 91, 99; *Folsom* v. *Ninety-Six*, 159 U. S. 611, 627; *Wade* v. *Travis County*, 174 U. S. 499, 507.

class of securities, that, however much we may respect the judgment of those differing from us, we cannot give up our own." Mr. Justice Nelson in *Lee County* v. *Rogers*, 7 Wall. 181, 183.

"This court has always ruled that if a contract when made was valid under the constitution and laws of a State, as they had been previously expounded by its judicial tribunals, and as they were understood at the time, no subsequent action by the legislature *or the judiciary* will be regarded by this court as establishing its invalidity. Such a rule is based upon the highest principles of justice. Parties have a right to contract, and they do contract in view of the law as declared to them when their engagements are formed. Nothing can justify us in holding them to any other rule." Mr. Justice Strong in *Olcott* v. *The Supervisors*, 16 Wall. 678, 690.

"When the bonds were issued, there had been no authoritative intimation from any quarter that such statutes were invalid. The legislature affirmed their validity in every act by an implication equivalent in effect to an express declaration. And during the period covered by their enactment, neither of the other departments of the government of the State lifted its voice against them. *The acquiescence was universal.*

"The general understanding of the legal profession throughout the country is believed to have been that they were valid. The National Constitution forbids the States to pass laws impairing the obligation of contracts. In cases properly brought before us that end can be accomplished unwarrantably no more by judicial decisions than by legislation. Were we to yield in cases like this to the authority of the decisions of the courts of the respective States, we should abdicate the performance of one of the

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most important duties with which this tribunal is charged and disappoint the wise and salutary policy of the framers of the Constitution in providing for the creation of an independent Federal judiciary. The exercise of our appellate jurisdiction would be but a solemn mockery." Mr. Justice Swayne in *Township of Pine Grove* v. *Talcott*, 19 Wall. 666, 677, 678.

"After a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself, and a change of decision is to all intents and purposes the same in its effect on contracts as an amendment of the law by means of a legislative enactment." Mr. Chief Justice Waite in *Douglass* v. *County of Pike*, 101 U. S. 677, 687.

"When the decisions of the state court are not consistent, we do not feel bound to follow the last, if it is contrary to our own convictions—and much more is this the case, where, after a long course of consistent decisions, some new light suddenly springs up, or an excited public opinion has elicited new doctrines, subversive of former safe precedent." Mr. Justice Grier in *Pease* v. *Peck*, 18 How. 595, 599.

"Rights acquired on the strength of the former decision ought not to be lost by a change of opinion in the court." Mr. Justice Davis in *Township of Elmwood* v. *Marcy*, 92 U. S. 289, 294.

"A contract having been entered into between the parties, valid at the time, by the laws of the State, it is not competent even for its legislature to pass an act impairing its obligation, *much less could any decision of its courts have that effect.*" Mr. Justice Nelson in *Chicago* v. *Sheldon*, 9 Wall. 50, 55.

The true and sound distinction between cases originating in the federal courts and those coming to this court on writ of error to a state court has been most clearly illustrated in the cases of *Central Land Company* v. *Laidley*, 159 U. S. 103, 111, and *Bacon* v. *Texas*, 163 U. S. 207, 221.

IV.

THE SUIT IS NOT ONE AGAINST A STATE.

The true ground of decision upon this point has been lately pronounced by this court in *Fitts* v. *McGhee*, 172 U. S. 516, where Mr. Justice Harlan, after observing (p. 525) that "what is and what is not a suit against a State has so frequently been the subject of consideration by this court that nothing of importance remains to be suggested on either side of that question," proceeded to distinguish a suit against officers of a state, as such, to restrain them from enforcing laws of the state which imposed no special duty upon them, from a suit to restrain state officers "specially charged with the execution of a state enactment alleged to be unconstitutional, but under the authority of which, it was averred, they were committing or were about to commit some specific wrong or trespass to the injury of the plaintiff's rights" (p. 529.) The opinion continues as follows (*ib.*):

> "There is a wide difference between a suit against individuals, holding official positions under a State, to prevent them, under the sanction of an unconstitutional statute, from committing by some positive act a wrong or trespass, and a suit against officers of a State merely to test the constitutionality of a state statute, in the enforcement of which those officers will act only by formal judicial proceedings in the courts of the State. In the present case, as we have said, neither of the state officers named held any special relation to the particular statute alleged to be unconstitutional. They were not expressly directed to see to its enforcement."

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Herein lies a wide distinction between *Fitts* v. *McGhee* and similar cases, and the case at bar, where the statutes which are alleged to impair the obligation of the contract not only "specially charge" upon the State Revenue Agent the duty of enforcing their provisions, but even create the very office itself. As to the appellant, these statutes are void, and so they can confer no valid power or authority upon the incumbent of the office in respect of the appellant's property. His action, to this extent, being based upon an unconstitutional and void statute, is itself lawless, and there is ample jurisdiction to restrain him from proceedings which will cause the appellant irreparable injury by involving it in a multiplicity of suits and casting cloud upon its title. The case is within the rule laid down by this court in *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362, 388; *Scott* v. *Donald*, 165 U. S. 58, 67; and *Smyth* v. *Ames*, 169 U. S. 466, 518. The railroad commission is also specially charged with the duty of assessment, certification and revision by the same statutes which, as to the appellant, are powerless to confer any constitutional authority.[1]

It is also to be observed that, under section 3880 of the Mississippi Annotated Code of 1892, the assessment rolls were required to be so made "that each county, levee district and municipality shall receive its just share of such taxes proportionately to the amount of property therein situated," and under the Act of February 7, 1894, creating the office of State Revenue Agent, that official has a

[1] In *Poindexter* v. *Greenhow*, 114 U. S. 270, 288, the defendant sought to substitute the State in his place under cover of unconstitutional state legislation. This court brushed the attempt aside, thus referring to the unconstitutional law:

"That, it is true, is a legislative act of the government of Virginia, but it is not a law of the State of Virginia. The State has passed no such law, for it cannot; and what it cannot do, it certainly, in contemplation of law, has not done."

"right of action" where the "state, or any county, municipality or levee board has the right of action or may sue" (Laws Mississippi, 1894, p. 29). The state was therefore not the only party in interest in collecting these taxes, its interest is comparatively small, and the counties, municipalities and levee boards have the substantial interest in the subject matter. There is no constitutional inhibition against such suits against municipal corporations or their representatives. *Lincoln County* v. *Luning*, 133 U. S. 529.

CONCLUSION.

For these reasons it is urged that the very serious questions of jurisdiction presented by this appeal should be reserved until they can be argued at the bar of this court.

Washington, November 6, 1899.

WILLIAM D. GUTHRIE,
JAMES FENTRESS,
EDWARD MAYES,
Of counsel for appellant.

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No. 318. 77

Affidavit for Appr.

Filed Nov. 6, 1899.

Supreme Court of the United States.

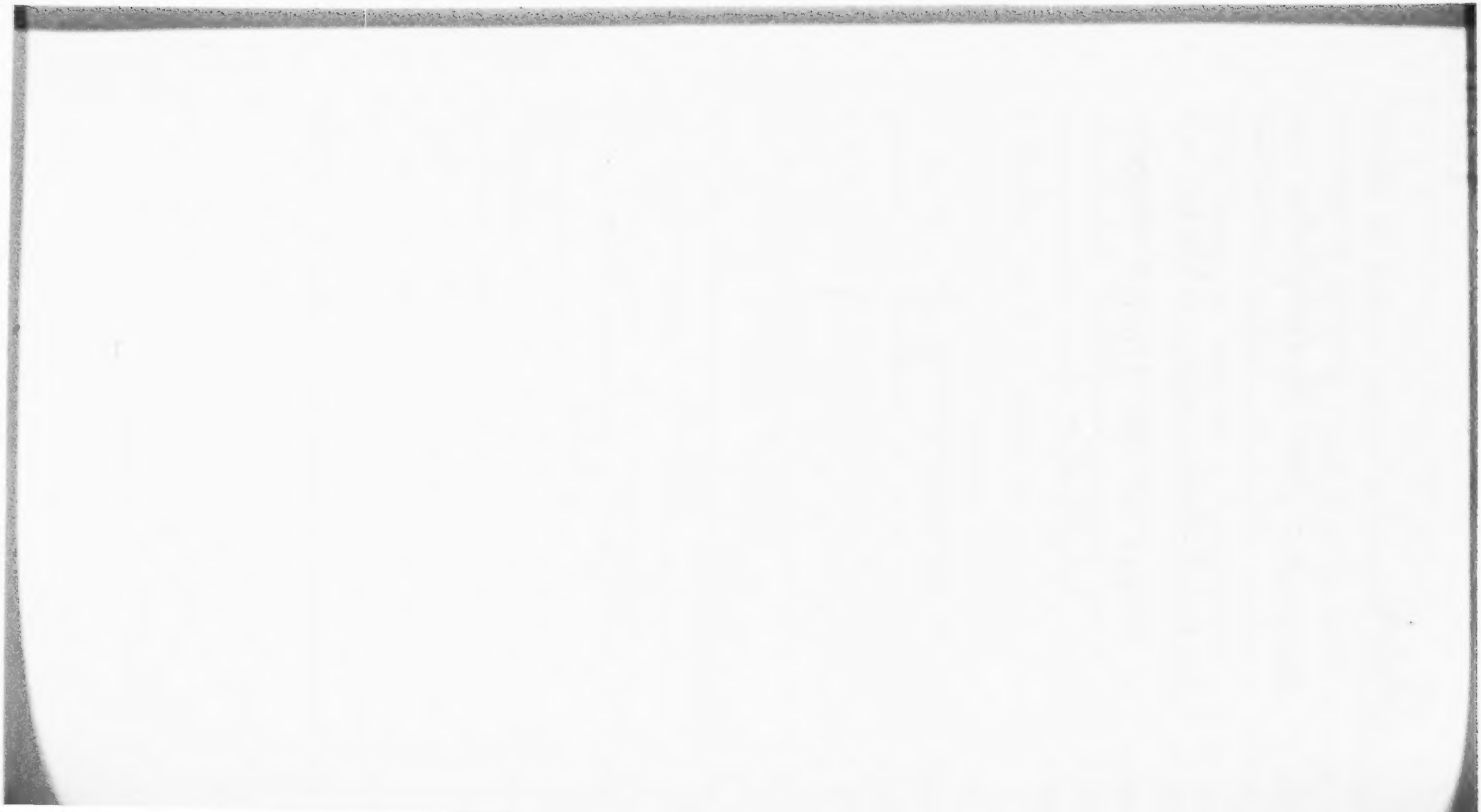
OCTOBER TERM, 1899.

NO. 318.

THE ILLINOIS CENTRAL RAILROAD COMPANY,
Appellant,
vs.
WIRT ADAMS, State Revenue Agent, *et als.*

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF MISSISSIPPI.

AFFIDAVIT OF EDWARD MAYES IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM.



STATE OF TENNESSEE, }
Shelby County. }

Personally appeared before me Sam Holloway, a Notary Public, in and for the County and State aforesaid, Edward Mayes, attorney at Law, of Jackson, Mississippi, who being by me duly sworn, on oath says: That a certain suit in Chancery was brought by Wirt Adams, State Revenue Agent of the State of Mississippi, in the Chancery Court of Clay County, Mississippi, on the 26th day of April, 1899, to recover back taxes assessed by the Board of Railroad Assessors of the State of Mississippi, against the railroad property of the Canton, Aberdeen & Nashville Railroad Co., in and for the years of 1886 to 1897 inclusive; that the said demand so sued on by the said State Revenue Agent, was the same identical demand as to which the Illinois Central Railroad Co. had filed theretofore its bill of injunction in the United States Circuit Court, at Jackson, Mississippi,—on which bill of injunction such proceedings were had that the said bill of injunction was finally dismissed by the said United States Circuit Court on or about the first Monday of May, 1899, from which decree of dismissal the said Illinois Central Railroad Co. prayed an appeal to the Supreme Court of the United States, which appeal is now pending in said Supreme Court of the United States, and is numbered 318 on the October Docket, 1899; that the said bill in Chancery so filed in the Chancery Court of Clay County, Mississippi, was afterwards amended by the said State Revenue Agent, so as to include additional taxes on the same property for the year 1898; that as so amended, the said Chancery cause was set for hearing conformably to the laws of the State of Mississippi, before the Chancellor, on the Bill and Answer;

that having heard the same, the Chancellor rendered a decree in favor of the complainant for all of said taxes hereinbefore mentioned, amounting to the sum of over Ninety-eight Thousand ($98,000) Dollars; that from said decree the defendants, who were the Canton, Aberdeen & Nashville Railroad Co., and Illinois Central Railroad Co.—prayed their appeal in due form, to the Supreme Court of the State of Mississippi, which was granted with supersedeas, upon the execution of the usual supersedeas bond in double the amount of the decree, and said judgment superseded as the law of Mississippi, in such case, provided; and the said appeal is now pending, so superseded, before the Supreme Court of the State of Mississippi.

EDWARD MAYES.

Sworn to and subscribed before me, this 30th day of October, 1899.

SAM HOLLOWAY,
Notary Public.

[NOTARIAL SEAL.]